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Supreme Court of the United States

October Term, 1959

No. 472

UNITED STATES OF AMERICA, EX REL. SOL R. RAUCH and HAROLD D. RAUCH,

Relators-Petitioners,

against

JOSEPH STOCKINGER and ALEX KRINSKY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR LEAVE TO FILE PETITION FOR REHEARING OF A PRIOR APPLICATION FOR A WRIT OF CERTIORARI, ON BEHALF OF THE ATTORNEY GENERAL OF THE PROVINCE OF ONTARIO, CANADA, AS *AMICUS CURIAE*

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Facts

On or about August 21, 1958, the Government of Canada made formal request to the Secretary of State of the United States for the extradition and delivery of the Defendants, Sol R. Rauch and Harold D. Rauch, accused of committing the crime of theft of money and securities and of fraudulently obtaining money and securities by deceit, falsehood or other fraudulent means, committed within the jurisdiction of Canada. On or about August 26, 1958, the Acting Secretary of State of the United States acknowledged receipt of this request, and informed the Ambassador of Canada that the Department of State will be pleased to give consideration to this request when the necessary legal procedures set forth in Section 3184 of Title 18 of the United States Code have been completed.

On or about September 26, 1958, complaints were filed against each of the defendants with the United States Commissioner for the Eastern District of New York, and

warrants issued for their apprehension. On October 6, 1958, both defendants surrendered to United States Marshal, and were arraigned before Honorable Salvatore T. Abruzzo, where they were paroled in their own custody, pending a hearing subsequently set for October 24, 1958.

After hearings held on November 5, 18, 21 and 26, 1958, before Honorable Salvatore T. Abruzzo, United States Commissioner for the Eastern District of New York, a determination was made by the Commissioner in part as follows:

> "The prosecution has, by ample evidence, established probable cause that the crime of larceny as contained in the Penal Law of Canada, and as defined by the Treaties and Supplementary Conventions thereto, and the Penal Laws of the State of New York, was committed by the Defendants, and the Commissioner will certify to the Secretary of State that the Defendants be extradited to the Province of Ontario, Canada, for prosecution." (Minutes of Hearing, page 217—line 20 to page 218, line 5.)

After this decision by the Commissioner, the defendants were remanded to the custody of the United States Marshal. They were subsequently released on bail, pending the determination of the Writ of Habeas Corpus.

In an opinion dated February 16, 1959, Honorable Mortimer W. Byers dismissed the Writ of Habeas Corpus.

Thereafter an appeal was taken from the decision of Honorable Mortimer W. Byers to the United States Circuit Court of Appeals for the Second Circuit.

The United States Circuit Court of Appeals for the Second Circuit, by its mandate decided July 10, 1959, unanimously affirmed the decision of Judge Byers.

Thereafter, a Petition for rehearing of the Appeal to the United States Court of Appeals for the Second Circuit was unanimously denied by said Court on August 3, 1959.

Thereafter, a motion for a stay of the issuance of the Mandate of the United States Court of Appeals for the Second Circuit was unanimously denied by said Court on August 17, 1959.

A motion before the Supreme Court of the United States for a stay of all proceedings pending the petiton for a Writ of Certiorari to the Supreme Court was withdrawn by the relators-petitioners. This petition had been returnable on September 2, 1959.

A motion for a stay of all proceedings pending the Petition for a Writ of Certiorari to the Supreme Court of the United States was made in the United States District Court for the Eastern District of New York, and was granted by Honorable Matthew T. Abruzzo, on September 22, 1959, on condition that said petition for a Writ of Certiorari be filed in the United States Supreme Court within thirty days from the date of the entry of the order.

The Petition for a Writ of Certiorari was duly filed with the Supreme Court of the United States and on December 7, 1959, said petition was denied.

Thereafter, on or about December 30, 1959, a petition to re-argue the original petition for the issuance of a Writ of Certiorari was filed in the United States Supreme Court. At the same time a motion for a stay of all proceedings, pending the petition to re-argue, was denied by Honorable John R. Bartels, Judge of the United States District Court for the Eastern District of New York on January 18, 1960. The relators-petitioners thereupon withdrew the petition to re-argue before the United States Supreme Court on January 19, 1960, and thereafter filed a petition for leave to re-argue the petition for a writ of certiorari before the United States Supreme Court, a copy of which was served on or about January 27, 1960.

In the interim, another motion was made for a stay of all proceedings, pending the determination by the United States Supreme Court of the petition for leave to re-argue the petition for a writ of certiorari, before Honorable Mor-

timer W. Byers, Chief Judge of the United States District Court for the Eastern District of New York. On January 21, 1960 this motion was argued before Judge Byers, who refused to either grant or deny same, but reserved decision pending the decision of the United States Supreme Court of the petition for leave to re-argue.

POINT I

The petition for leave to re-argue the petition for a writ of certiorari should be denied.

An analysis of all of the proceedings heretofore had herein, and the case upon which all previous determinations were based, lead to the conclusion that this Honorable Court should deny the petition for leave to re-argue the petition for a writ of certiorari. Such a conclusion is completely in accord with the rules applied by this Court in *Alabama Power Co.* v. *Ickes*, 1938, 85 S. Ct. 300, 302 U. S. 464, 82 L. Ed. 374, in which this Court held that findings of fact made after hearing by District Judge on undisputed or unconflicting evidence, not questioned by Appellate Court and not without substantial support in evidence, were acceptable by the Supreme Court as unassailable.

Despite the protestations of the relators-petitioners' attorney that the many attempts to delay the final return of the relators-petitioners to Canada for trial are made in good faith, and not for the purpose of delay, it is obvious that they are grasping at straws and making a mockery of the ordinary procedure of our Courts, in avoiding the bringing of this matter to a final conclusion. The Province of Ontario, Canada, has been put to extraordinary expenses and unusual delays in bringing to trial, not only these two individuals, but three others named in said indictment who have already been arraigned and are awaiting trial. Other attorneys are involved, as well as the Courts of Canada, so that continued delay, in a matter so clearly properly de-

cided in every Federal Court of the United States, is completely frustrating to every one concerned. Every constitutional right of the relators-petitioners has been guarded and protected throughout all these proceedings and the time has come, we respectfully urge, for a consideration of others involved in these proceedings.

As pointed out in our brief filed in opposition to the original petition for a writ of certiorari, the indictment under attack is superfluous in obtaining extradition to a foreign country. The authenticated affidavits of the witnesses who testified in Canada, not only before the Justice of Peace who issued the warrants in Toronto, but also before the Grand Jury, are fully sufficient to apprise the relators-petitioners of the crime with which they are charged, and certainly sufficient, not only to prepare their defense, but to protect them from double jeopardy, completely satisfying the requirements of the Fifth and Sixth Amendments of the Constitution of the United States.

The alleged basis for the present application by the attorney for the relators-petitioners is his accidental discovery of the case of *White* v. *U. S.*, 67 F. (2d) 71. His conclusions as to the effect of the holding in that case on the instant case is sheer sophistry. Even in the majority opinion, the Court admits that the Tenth Circuit has a rule of its own in connection with the requirements of an indictment. The majority opinion at page 78 says:

> "If it may be said that there are two schools of Judicial thought in regard to the indefiniteness of indictments, we of the Tenth Circuit are committed to the more stringent rule", * * *

The decision of the majority in the *White* case, as shown in the dissenting opinion, is contrary to the rule as established by decisions in the Second, Fourth, Fifth, Sixth and Eighth Circuit Courts.

The *White* case deals entirely with an indictment in a bankruptcy matter, and the difficulties in such cases of

setting forth specifically the alleged properties, the subject of the crime charged. In almost every instance, the sufficiency of the indictment is or should be the object of a demurrer. In our instant case, the indictment can only be tested in the Courts of Canada, and the relators-petitioners will be fully protected in their rights by said Courts.

The holding in *White* v. *U. S.* (*supra*), is contrary to the holding in *Greenbaum* v. *United States* (C. C. A.), 280 F. 474, which held an indictment sufficient which described the property concealed as "consisting of money and merchandise to the value of $30,000.00". In that case, the Trial Court overruled the demurrer to the indictment, but sustained a demand for a bill of particulars, and the Court of Appeals approved.

See also:

Keshinsky v. *U. S.* (C. C. A.) Fifth Circuit, 12 F. (2d) 767, 768;

Kanner v. *U. S.* (C. C. A.) Second Circuit, 21 F. (2d) 285, 286;

Saleeby v. *U. S.* (C. C. A.) Fourth Circuit, 21 F. (2d) 713, 714;

Gerson v. *U. S.* (C. C. A.) Eighth Circuit, 25 F. (2d) 49, 52.

There are six headnotes cited as a preface to the decision in *White* v. *U. S.* (*supra*). We agree with the conclusions in all of them, but respectfully urge that none of them affect the prior determination of this Court in the instant case—for all of them have been complied with insofar as this extradition is concerned.

The crux of the determination of the majority in *White* v. *U. S.* (*supra*), appears to be based on the allegation contained in the indictment, as follows:

> "Did knowingly, fraudulently and feloniously conceal personal property of the said Pig Skin Davis, Incorporated of the total value of Seventeen Thou-

sand ($17,000.00) Dollars, *a more particular description thereof, being to the Grand Jurors unknown*". (Italics ours.)

In *Greenbaum v. United States* (*supra*), the indictment charged:

> "Said property consisting of money and merchandise to the value of $20,000." In holding this indictment sufficient the Court said "The indictment discloses in plain and unambiguous terms all the essential elements of the offense charged".

In *Keshinsky v. United States* (*supra*) the indictment charged in part:

> "A more particular description of which is to your Grand Jurors otherwise unknown". The Court held this indictment to be sufficient and affirmed the conviction.

In *Kanner, et al. v. United States* (*supra*), the indictment charged:

> "did * * * unlawfully, knowingly and fraudulently, and while they were bankrupts as aforesaid conceal from [their trustees] certain monies and properties then and there belonging to the estate in bankruptcy, to wit, monies and certain other property of divers amount, the exact amount and more particular description of which are to the Grand Jurors unknown". The Court upheld the sufficiency of this indictment.

It is therefore obvious that *White v. U. S.* (*supra*), is unreliable and certainly not followed in the many other Circuit Courts of Appeals, and should not under any circumstances be sufficient to persuade this Court to reverse its previous rulings in the case at bar.

The indictment in the instant case provides in Count I thereof, as follows:

> "Did steal money and securities to the value of $960,000.00 more or less, the property of Brilund,

Mines Limited, contrary to the Criminal Code".

And in Count 2 thereof:

"by deceit, falsehood or other fraudulent means defrauded Brilund Mines Limited of money and securities to the value of $960,000.00 more or less, contrary to the Criminal Code".

It is obvious that the indictment, under the leading cases, definitely apprises the relators-petitioners of the specific crimes with which they are charged, so that they are sufficiently enabled to prepare their defense to same, and are provided amply with protection against being hereafter placed in double jeopardy.

We respectfully refer to this Court, and ask that same be considered, the previous brief filed herein in opposition to the petition for a writ of certiorari.

CONCLUSION

The petition for leave to file a petition for rehearing of the prior petition for a writ of certiorari should be denied and the relators-petitioners remanded to the custody of the respondents to await the action of the Department of State in returning the relators-petitioners to Canada for trial.

Respectfully submitted,

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